United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 19685

(Habeas Corpus 208-65)

Samuel L. Solomon, Appellant

v.

Dale C. Cameron, Superintendent
St. Elizabeth's Hospital, Appellee

Appeal from judgment of the United States District Court for the District of Columbia

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May 16, 1966

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Statement of Questions Presented

The questions presented by this appeal are:

1. Whether the revocation of petitioner's conditional release by Judge Beard of the United States Court of General Sessions on February 17, 1965 was in denial of due process.

2. Whether the United States Court for the District of Columbia erred in denying the writ of habeas corpus on the grounds that petitioner is suffering from an abnormal mental condition which requires continued hospitalization in the maximum security ward of St. Elizabeths.

3. Whether the United States District Court for the District of Columbia erred in holding that continued detention alone is treatment of the condttion which led to the acquittal by reason of insanity.

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BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal from a judgment of the United States District Court for the District of Coumbia entered on August 4, 1965, dismissing the petition for writ of habeas corpus and remanding petition to the custody of appellee. Notice of Appeal was filed by petitioner, pro se, on September 9, 1965. Undersigned counsel was appointed by this Court on February 14, 1966. Jurisdiction of this Court is based upon 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

Samuel Leonard Solomon is a white male, born in 1920, who first came to Washington in 1961. He worked for Lansburg's Furniture store and Lansburg's Department Store as a salesman, never making more than $75.00 a week. In 1962 charges were brought against Solomon in what was then the United States Municipal Court. Case No. 550-62. February 23, 1962, Solomon was found not guilty by reason of insanity of the charges against him. The charges were false pretenses, based upon a check he had written.

Mr. Solomon was sent to St. Elizabeths Hospital where he remained until May of 1963, when he received a conditional release from St. Elizabeths. Petitioner continued to live on the grounds of St. Elizabeths but worked during the day in the District of Columbia. In February, 1964 petitioner's conditional release was revoked by Judge Youngdahl of the United States District Court for the District of Columbia. This conditional release was revoked because petitioner had obligated himself for credit, even though he was making payments on the amounts due. There is no testimony showing that petitioner engaged in any false pretenses in obtaining this credit.

On the revocation of his conditional release in February 1964, petitioner was "assigned" to the John Howard Pavillion at St. Elizabeths.

On July 14, 1964, a new conditional release was granted to the appellant and he went with his brother to the Boston, Massachusetts area. On or about October 31, 1964, the appellant's brother, Albert Solomon, gave him $75.00 and a one way ticket to San Juan, Puerto Rico. Although appellant did not wish to leave the Boston area, his brother coerced him into doing so (T. 117).

After staying several weeks in San Juan, petitioner went to a Miami-Fort Lauderdale-Palm Beach area of Florida. He held various jobs in this area and remained there until February 17, 1965. At no time during this period, while he was on conditional release, did appellant write checks for which he did not have funds. The most that can be said is that he incurred certain obligations by accepting credit that was tendered by shopkeepers and businessmen. (T. 125).

On or about February 4, 1965, petitioner became troubled about his status, since he was not in the Boston area as anticipated by his conditional release. Because of this concern, he called St. Elizabeths Hospital to inquire about his status. Because of doubts created in this telephone conversation appellant returned voluntarily to the District of Columbia, arriving here by aircraft on February 17, 1965. Thereafter, he appeared before Judge Beard of the Court of General Sessions and his conditional release was revoked. On May 13, 1965, appellant filed a Petition for Writ of Habeas Corpus with the United States Court for the District of Columbia.

STATEMENT OF POINTS

1. The United States District Court for the District of Columbia, Judge Robinson, erred in failing to grant the petition for write of habeas corpus on the grounds that the hearing before Judge Beard on February 17, 1965 contained nothing to show that the appellant was still suffering from the mental illness which resulted in his confinement in St. Elizabeths. There was no testimony to show that appellant had indulged in false pretenses during the term of his conditional release, between July, 1964 and February, 1965.

2. The United States District Court for the District of Columbia erred in denying the write of habeas corpus because the record as a whole showed that the appellant was not suffering from any abnormal mental condition which would likely result in his utilization of false pretenses if released unconditionally from St. Elizabeths Hospital.

3. The United States District Court for the District of Columbia erred in holding that purely custodial detention was treatment for the condition which led into appellant's hospitalization, within the meaning of 24 D.C. Code 301, et seq.

SUMMARY OF ARGUMENT

I. <u>The revocation of the conditional release by Judge Beard on February 17, 1965 was in error.</u>

In February 1965 appellant conferred by telephone with St. Elizabeths Hospital regarding his legal status. As a result of this conference, appellant was urged to return to the District of Columbia for consultations. He did so

voluntarily, but found upon his return that he was met at the airport by the United States Marshals. He received a hearing before Judge Beard, of the Court of General Sessions, and, in spite of protestations, was remanded to the custody of St. Elizabeths. He was returned to the John Howard Pavillion forthwith. This action was taken by Judge Beard without any testimony that appellant was likely to be dangerous to himself or the community by repeating the misdemeanor for which he was orignally sent to St. Elizabeths in 1962, specifically utilization of false pretenses. Although record of this hearing is not available, there could have been no testimony before Judge Beard that indicated a likelihood that appellant would indulge in false pretenses again.

II. <u>The hearing before Judge Robinson shows that appellant has recovered and that it was arbitrary to fail to grant appellant his unconditional release</u>.

In the preceding argument, the hearing on the petition for writ of habeas corpus has shown that petitioner should have been enjoying a conditional release at the time of the hearing before Judge Robinson. Proceeding to the next step, the condition of the appellant at the hearing before Judge Robinson, it is clear that the write of habeas corpus should have been granted by Judge Robinson on the grounds that appellant is not suffering from any abnormal mental condition, of the same nature which gave rise to

his original detention in St. Elizabeths. With the very best of intentions, Judge Robinson has been improperly influenced by the fact that he concluded the appellant might improvidently seek and obtain credit for items that were other than pure necessities. This is a civil matter, not criminal. Original commitment of Mr. Solomon was based on criminal allegations involving utilization of false pretenses. Incurring debts or obligations is not a criminal act. It is wholly wrong to infer therefrom a likelihood that a person might go further and undertake false pretsenses, which would be a criminal question. This erroneous argument was made by the Government in this case (T. 227) and is relied upon by Judge Robinson (T. 233) in making his decision.

III. <u>Appellant cannot be held because he is receiving no treatment as is required by statute.</u>

It was clearly established on the record that the only treatment Mr. Solomon is receiving at St. Elizabeths, in the maximum security ward, is custodial care or detention. Judge Robinson found that this has therapeutic values (T. 234). The requirements of 24 D. C. Code 301(d) are not being met. The clear basis for the commitment is for receipt of treatment of the mental condition or emotional disorder which led to the decision by the Court of General Sessions in 1962 that appellant was not guilty of false pretenses, by reason of insanity. Testimony of the three psychiatrists before Judge Robinson clearly shows that there is no substantial likelihood, if he were released, that petitioner would seek to obtain money by false pretenses.

This demonstrates conclusively, under the second argument of appellant, that he is cured of the mental condition which led to his original hospitalization. It shows that appellant is not now receiving treatment and will not in the future receive treatment for the condition which led to his original hospitalization.

ARGUMENT

I. The revocation of the conditional release by Judge Beard on February 17, 1965 was an error.

Appellant received a conditional release in July 1964 and departed the area with his brother. Appellant resided in the Boston area until his brother gave him a one-way airplane ticket to San Juan and told appellant to leave. Appellant did not leave the Boston area voluntarily. From San Juan, appellant went to South Florida. About February 4, 1965, appellant called St. Elizabeths to inquire about his status, since he thought he should be in the Boston area. The doctor with whom appellant spoke stated that there was doubt in his mind and suggested that appellant return to Washington to clear up the doubt. He returned on February 4, 1965(T. 142).

As a result, appellant was taken before Judge Beard, where Dr. Platkin testified regarding appellant's mental condition. Judge Beard held a preliminary hearing and revoked the conditional release on February 17, 1965. Appellant was committed to St. Elizabeths (T. 66).

The evidence before Judge Beard was wholly inadequate to serve as a basis for revocation of the conditional release and remand of appellant to the John Howard Pavillion of St. Elizabeths. While there is no record of the actual proceedings before Judge Beard, the facts came

out in testimony before Judge Robinson.[1] Appellant has challenged the validity of the revocation (T 68-69). At the time of revocation of the conditional release, February 1965, Dr. Leonard Zegans testified that appeallant had only a character neurosis or "neurotic reaction, other" (T. 36). Dr. Platkin agreed with this analysis (T. 146). With regard to the insufficiency of the hearing before Judge Beard this Court's attention is invited to the testimony of Dr. Platkin:

> "I might say that Judge Beard harly permitted me to say anything. It was only by being a little impertinent in Court that I was able to get some remark in." (T. 158).

Judge Beard to Dr. Platkin, at the preliminary hearing on February 17, 1965 (according to Dr. Platkin):

> "Make up your mind, do you want him or don't you want him?"(T. 183).

Dr. Platkin explained to Judge Beard that he wanted appellant.

This Court should set aside the action of Judge Beard which revoked the conditional release. A hearing de novo should be held to determine if grounds exist for the revocation. Appellant relies on Darnell v. Cameron, 121 U.S. App. D. C. 58, 348 F. 2d 64(1965) which holds that an order for

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1/ Appellant finds no problem in raising this matter at this time, since this Court has the authority to correct the error - if it is persuaded by appellant's views - in what has been termed a "preliminary hearing" before Judge Beard.

conditional release can be revoked "only after full hearing." The testimony cited above clearly shows that the hearing before Judge Beard was "pro forma" and the record describes it as a "preliminary hearing." In fact, Dr. Platkin stated before Judge Robinson:

> "Well, the Superintendent had requested a conditional release, and this is what we are asking to have revoked now; but he has never asked for an unconditional release." (T. 189-190).

II. The hearing before Judge Robinson shows that appellant has recovered and that it was arbitrary to fail to grant appellant his unconditional release.

Appellant asks this Court to read his testimony before the District Court. In conjunction with the testimony of the three doctors who testified at the hearing, it shows the appellant has not and will not be dangerous or engage in any criminal act. In the course of two conditional releases, the appellant did not write a check. Thus, it certainly does not seem likely that he will do so if he obtains an unconditional release. While Dr. Zegans testified that there was a probability that appellant may incur obligations beyond his reasonable ability to pay (T. 47-49), this testimony cannot support a conclusion that appellant is dangerous to himself or to the community. The doctor went on to state that there was no certainty that the appellant would even purchase things he does not need (T. 50). Under these circumstances it was arbitrary for Judge Robinson to dismiss the petition for writ of habeas

corpus and remand appellant to St. Elizabeths. Clearly, the hearing showed that appellant met the tests set in the case of Overholser v. O'Beirne, 112 U.S. App. D. C. 267, 302 F. 2d 852 (1962).

Judge Robinson found that Mr. Solomon was suffering from an abnormal mental condition. In reaching this conclusion, at page 230 of the transcript, Judge Robinson stated that it was based upon the entirety of the testimony of the three doctors. But what conduct did Judge Robinson find would be involved, such as would require the continued detention of the appellant in St. Elizabeths? Judge Robinson found at page 231 of the transcript that, if appellant were to be released, it is probable that the petitioner would engage in transactions which would involve the extension to the petitioner of credit beyond the ability of petitioner to repay. You are asked to continue to detain appellant because he might overextend himself with credit, if he were to be released from St. Elizabeths. There is absolutely no finding that Mr. Solomon would engage in false pretenses or any other crime, merely that he might obligate himself ro more than he could pay. In other words, he might become a debtor. Appellant testified that he learned his lesson about writing checks in 1962 and that he has learned his lesson about running up bills (T. 125). There is absolutely no jusitification for holding that a mere debtor will be dangerous to himself or others.

The testimony of Dr. Platkin is that appellant has been unable to make a social adjustment - unable to conduct himself as one would expect of a man of his age, education and social status (T. 178). Samuel L. Solomon is in the maximum security ward of St. Elizabeths, John Howard Pavillion. One cannot help but wonder about the need for this.

Dr. Platkin sums it up by calling appellant a public nuisance. But he is a gentle, non-violent public nuisance. He would never indulge in physical violence (T. 175). He is not dangerous to the c ommunity (T. 168). He is a forty-six year old bachelor, an artistically inclined individual who did not fit into the family mold.

In two releases that the appellant has had since 1961, conditional in nature, he has never once been charged with writing a check for which he did not have sufficient funds. His own testimony is uncontroverted, and it shows that he has learned his lesson on check writing. In brief, the testimony in this case clearly shows that any mental disorder the appellant may have had in writing checks for which he did not have a bank account or sufficient funds has been successfully treated by the hospital over the past four years. Appellant has been cured and should be released.

To be entitled to unconditional release, appellant has the burden of showing that he is no longer subject to the same mental abnormality

which produced the criminal act in 1962. Lynch v. Overholser, 369 U.S. 705, 8 L ed 2d 211 (1962). The record below shows conclusively that appellant has met this burden. He will not write checks for which he does not have funds.

The instant case is distinguishable from the case of Overholser v. Russell, 108 U.S. App. D. C. 400, 283 F. 2d 195(1960). In the Russell case there was testimony that Russell "needed further treatment in the hospital and that, if released, he would be dangerous to society because of his check-writing proclivity." supra, 403. As pointed out previously, the evidence before Judge Robinson will not support a similar conclusion about the appellant. Appellant voluntarily returned on February 4, 1965, innocent of knowledge or even suspicion that he would be returned to the John Howard Pavillion at St. Elizabeths. During his conditional releases, he had not shown any proclivity to write checks. It was this act that caused his original hospitalization in 1962. There is no room for doubt that this has been cured. There is no basis to hypothesize that the appellant will ever write a check again.

Appellant urges this court to examine the question presented in the following light. Would this Court sustain a civil commitment on the basis of the hearing before Judge Robinson? This Court could not do so on the basis of any fact in the record to support a conclusion that appellant might be dangerous. Neither could it be done on a conclusion that

commitment would offer opportunity for "treatment". The desire of "society" to be insultated from an individual does not justify confinement of the individual in a mental institution. See Civil Commitment of the Mentally Ill. 79 Harvard L R 1288.

III. Appellant cannot be held because he is receiving no treatment as is required by statute.

Appellant relies on the case of Darnell v. Cameron, 121 U.S. App. D. C. 58, 348 F. 2d 64 (1965). Reliance was placed on this Court's decision in the Darnell case by court-appointed counsel for appellant in the hearing before Judge Robinson (T. 218-219). In fact, counsel specifically invited attention to the following language from this Court's decision:

> "But mandatory confinement in a mental hospital under D. C. Code §24-301 rests on a supposition, namely, the necessity for treatment of the mental condition which led to the acquittal by reason of insanity, and this necessity for treatment presupposes in turn that treatment will be accorded." Darnell v. Cameron, supra 61.

Because the case of Lake v. Cameron, No. 18809 is pending before this Court on a rehearing en banc, appellant will not repeat the arguments made by counsel regarding the assumptions on treatment. As this Court is aware, the Lake case involves a civil commitment. It should be noted that Judge Robinson's findings and conclusions hold that appellant "continues to need treatment and is receiving treatment at St. Elizabeths Hospital." (Finding 5). Appellant holds to the view that this finding is not supported on the record. Custodial care is not "treatment" under the statute.

The hearing before Judge Rovinson clearly established that appellant is not receiving treatment. The Court below stated:

> "Counsel, I think he (appellant) has testified that he received no treatment since February of 1965, except one conference for about an hour with Dr. Platkin on yesterday (T. 132).

The testimony of the doctors confirmed that no "treatment" was being given and the Government was reduced to arguing that "treatment is available... if the petitioner wants it...it's there for him to take advantage of." (T. 229). The latter was a reference to educational and athletic programs (T. 153). Dr. Zegans testified that if appellant were to get an intensive therapeutic program that there is a chance that his behavioral patterns would be ameliorated (T. 38). Another doctor who testified thought differently. There is no spe cific course of treatment for the appellant and there is no certainty that keeping the appellant in St. Elizabeths will provide any benefit (T. 164, 192). Dr. Papish testified that appellant was irresponsible (T. 197). Appellant had a lack of insight and appreciation (T. 202).[2/]

The simple fact is that St. Elizabeths does not have facilities to treat simple irresponsibility. Dr. Papish testified on the prognosis for appellant:

> "I think that if he had the opportunity of continuing the individual therapy that he had, that this would offer probably the most opportunity. There is no guarantee. And that, I think, unfortunately is not something that is easily available at St. Elizabeths." (T. 208).

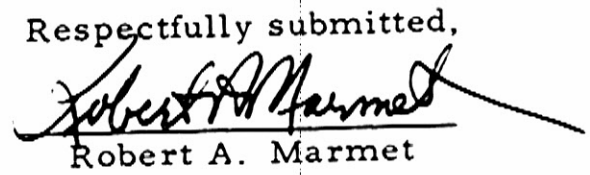
2/ As an aside, it must be noted that there are many persons who fit this category. Surely a person is not to be detained ad infinitum on such grounds.

Appellant submits that recreational therapy programs are available elsewhere, under circumstances that are far more productive. The mere availability of such activities at the hospital is no justification for the continued detention of appellant in St. Elizabeths. The only valid basis for keeping appellant is for "treatment". The hearing shows that appellant is not dangerous. If appellant, based on the testimony before Judge Robinson, requires treatment, it is clear that he is not going to get it at St. Elizabeths. Will all respect to the view of Judge Robinson that the mere retention of the appellant in the hospital is treatment, appellant asks this Court to hold that, in the circumstances of this case, appellant is not receiving treatment within the terms of the statute. One simple truth emerges - appellant is not going to receive "treatment" because the hospital maintains that it is almost impossible to provide it. This is not warrant for keeping appellant in custodial care when it is so undesired.

CONCLUSION

In view of the foregoing, appellant asks that this Court reverse the decision of the District Court and remand for proceedings consistent with this Court's Opinion.

Respectfully submitted,



May 16, 1966

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REPLY BRIEF FOR APPELLANT

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June 25, 1966

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REPLY BRIEF FOR APPELLANT

Preliminary Statement

The Counter Statement of the Case contained in the Brief of Appellee contains many statements which seem to misinterpret the record of this case. The distinctions between appellant's and appellee's interpretation of the record are considered under separate headings in connection with the argument in this reply brief. As a preliminary matter, however, appellant must object to the extensive references in the appellee's

brief to prior judicial proceedings affecting the appellant. Reviewing these references, it appears that they have no relevance to the issues in this appeal, and that their sole purpose is to disparage the character of the appellant. It is respectfully requested that these references be disregarded by this Court.

ARGUMENT

I. The absence of a transcript or a reasonable substitute precludes effective advocacy and meaningful review and is a substantial defect amounting to a denial of due process. This, coupled with the lack of alternative avenues of review, constitutes an exceptional circumstance justifying the use of a writ of habeas corpus.

1. It is conceded that a writ of habeas corpus generally cannot serve the function of an appeal. Nonetheless, relief by means of this writ has been granted "where the error was flagrant and there was no other remedy available for its correction." Sunal v. Large, 332 U.S. 174, 179 (1946). It is also clear that the writ is properly utilized when a trial violates specific constitutional guarantees. Ibid, at 332 U.S. 178-179.

2. The fundamental defect in the proceeding before the Court of General Sessions (U.S. 550-62) is the absence of a transcript or any reasonable substitute. For counsel to be the effective advocate described in Hardy v. United States, 375 U.S. 277, 281 (1964), he must often obtain

an entire transcript.[1]

3. The need for a transcript is well-illustrated by the instant case. Here, testimony given in the habeas corpus proceeding before the District Court raises serious doubt that appeallant's behavior justified the revocation of his conditional release by the Court of General Sessions. Of greatest importance, it seems questionable that the revocation of the conditional release was preceded by the "full hearing" required by Darnell v. Cameron, 121 U.S. App. D. C. 58, 348 F. 2d 64(1965). If appellant did not receive this "full hearing", then the court had no power to revoke his conditional release. Darnell, supra, at p. 60. Nonetheless, despite extensive attempts to ascertain what actually transpired, counsel can only inspect isolated pieces of evidence introduced in the habeas corpus proceeding.[2]

4. The dearth of available information precludes counsel from fulfilling his obligation to this indigent appeallant. Consequently, appellant is being denied the effective advocate and the due process of law to which he is constitutionally entitled.

5. Concurring in the Hardy case, Justice Goldberg recognized the necessity of an adequate record and urged that complete transcripts be

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1/ See also, Ellis v. United States, 356 U.S. 674, 675 (1958), and Johnson v. United States, 352 U.S. 565(1957).

2/ See testimony of Dr. Platkin (T. 146, 158) and that of Dr. Zagan (T. 36).

provided indigents in all appeals.[3] This Court held in Tate v. United States, ____U.S. App. D. C. _____, (Slip opinion, No. 19556, March 28, 1966) that complete transcripts must be provided to indigent appellants when counsel on appeal is different from trial counsel at least in all cases originating in the U.S. branch of the Court of General Sessions where such trial proceedings have been recorded.

6. Clearly, the rationale of the Hardy and Tate cases, requires that a transcript be made available to an indigent appellant in a criminal proceeding in the Court of General Sessions. It is within the supervisory powers of this Court to so require.[4] The record emanating from the Court of initial adjudication must be adequate to enable the appellate Court to discharge its statutory duty of review.

7. In cases in the District of Columbia Court of Appeals where there is no transcript available, appellate review is usually based upon a "statement of proceeding and evidence" prepared by trial counsel and

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3 / "If this requirement is to be more than a hollow platitude, then appointed counsel must be provided with the tools of an advocate. As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error,a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy." (375 U.S. at 339).

4 / See Griffin v. United States, 336 U.S. 704 (1949) and Fisher v. United States, 328, U.S. 463, 475 (1945).

approved by the Court. D. C. Ct. App. Rules 21, 23-25. In the instant case, no joint statement was ever prepared, the judge made no findings of fact, and wrote no opinion supporting his revocation of appellant's release. The entire record of the preliminary hearing before Judge Beard consists of the following notation:

> "Preliminary hearing held. Conditional release revoked. Defendant recommitted to St. Elizabeths."

8. The above record fails to satisfy "the constitutional requirement that in absence of a transcript, the appellate court must be provided with a 'picture' of the trial proceedings reasonably equal to that provided by a transcript." Tate, at 19. Compare also Draper v. Washington, 372 U.S. 487, 495 (1963); Griffin v. Illinois, 351 U.S. 12, 20(1956), cf. Miller v. United States, 317 U.S. 192, 198-99 (1942).

9. The situation in the instant case is closely analogous to that presented in Washington v. Clemmer, 119 U.S. App. D. C. 216, 339 F. 2d 715 (1964). There, the reviewing Court found that the absence of a transcript of a preliminary hearing made it impossible to review the question of "probable cause" which had been raised in a habeas corpus proceeding below. In the instant case, the absence of a transcript (or any reasonable substitute) makes it impossible to determine whether the full hearing required by the Darnell case, supra, was held.

II. The Court below erroneously found that the appellant may be kept in the maximum security ward of St. Elizabeths Hospital when appellant's mental condition permits his release.

A. The record clearly disclosed that appellant has recovered from his illness, that he has learned his lesson, and that he is able to live outside of the supervised environment of a hospital without subjecting himself to criminal liability.

10. Samuel L. Solomon is presently confined in the maximum security ward of St. Elizabeths Hospital, where he has continuously resided since his conditional release from this institution was revoked over sixteen months ago. The facts of record clearly show that appellant no longer requires hospitalization. In order to place these facts in perspective, and to correct erroneous implications in the brief of appellee filed, appellant must initially devote its attention to clarifying the record.

11. It must be emphasized, first of all, that Samuel Solomon has learned his lesson (Tr. 125). He did not pass any bad checks (the misdemeanor for which he was originally found not guilty by reason of insanity in February of 1962) during the eighteen months when he was conditionally released from the hospital. Nor has appellant been found guilty of any criminal offense involving false pretenses or fraudulent intent since 1962. The most that can be said is that Mr. Solomon may have incurred several small bills that he did not pay for when he was in Boston. 5/

5/ Appellee concedes that adequate evidence is lacking to make a deinite statement on this point (Br. 4, n. 4).

12. Appellee concedes that "there is no indication that he would engage in the variety of criminal false pretenses for which he stands convicted" (Br. 15), then goes on to urge that, nonetheless, appellant's behavior "can only end in harrassment, civil judgments, and criminal convictions" (Br. 16). The record at no place supports appellee's speculative assertions and exaggerated predictions concerning appellant's future conduct. Drs. Zegans (Tr. 15-16), Platkins (Tr. 156-57, 168-84) and Papish (Tr. 198) completely fail to support any statement that appellant will likely subject himself to criminal convictions and harrassment as suggested by the Government. The most that can be said of this testimony is that the doctors talked of some vague "probability" that appellant would purchase items beyond his ability to repay. No mention of criminal liability was ever made, and at one place Dr. Zegans explicitly stated that it was possible that Mr. Solomon could leave the hospital and never again be a "further menace to society in <u>any</u> <u>way.</u>" (Tr. 50, emphasis added). In fact, based upon his past conduct during the long period while he was away from the hospital, it appears that Mr. Solomon will live without engaging in any conduct involving false pretenses or criminal liability.

13. Appellee's brief also makes some unfortunately unfair statements about the present nature of Mr. Solomon's emotional problems and the extent

of his recovery. Appellee has labeled Samuel Solomon a "sociopath" and has proceeded from there to paint a distressingly dark picture of his chances of living outside the hospital without incurring additional problems. A review of the record below, however, shows that the three doctors who testified at the habeas corpus hearing gave varied, confusing and extremely vague accounts of the nature of Mr. Solomon's illness (Dr. Zagans, Tr. 145-46; Dr. Platkins, Tr. 143-45, 189; Dr. Papish, Tr. 196098). Appellant's mental condition obviously can not be described with the precision attempted by the government,[6] and this is emphasized by the fact that the hospital changed its official diagnosis of Mr. Solomon's illness at least once (Tr. 177).

14. It must be remembered that sociopaths display a wide variety of behavior,[7] and thus predictions concerning Mr. Solomon's future conduct must take into account the personal nature of his illness. It is also clear, as Dr. Cushard testified in the trial in Ragsdale v. Overholser, 108 U.S. App.

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6 / For another case in which testifying psychiatrists had substantial difficulty in reaching agreement about "sociopathic personalty disorders", see Overholser v. O'Beirne, 112 U.S. App. D. C. 267, 302F. 2d 852(1961).

7 / In fact, the very medical authorities relied upon so strenuously by appellee explicitly state that sociopathic personality disorders are not sharply defined and "lie in the wide zone between mental health and mental disease..." Noyes and Kolb, Modern Clinical Psychiatry 545 (5th ed. 1961).

D. C. 308, 310 n. 5, 281 F. 2d 943(1960), that sociopaths "are able to control their acts if they make the necessary effort." Mr. Solomon made such an effort when he lived outside of the hospital for eighteen months without engaging in any form of activity involving false pretenses. His past conduct demonstrates conclusively that he has recoved and would have no difficulty in avoiding the type of criminal activity that led to his original commitment.

B. Since Appellant is not receiving effective treatment, the statute compels his release from the hospital.

15. Persons committed to St. Elizabeths Hospital after being found not guilty of a criminal charge by reason of insanity, must receive "treatment" for the mental condition which led to confinement. Darnell v. Cameron, 121 U.S. App. D. C. 58, 348 F. 2d 64 (1965); Miller v. Overholser, 92 U.S. App. D. C. 110, 206 F. 2d 415 (1953). Appellee recites the "treatment" being accorded Mr. Solomon, (Br. 6-3, 11-14), and urges that this is more than adequate to satisfy the statutory requirments (Br. 11-12).

16. What the government urges is that adequate treatment amounts to no more than custodial care, recreational facilities (if appellant so chooses to avail himself of them) and the environmental therapy Mr. Solomon receives from living in an instution (Tr. 150-66). The government hardly has met its burden of demonstrating that the hospital insures that appellant in fact

receives sufficient individual and group attention. It is shocking to note that since Mr. Solomon's return to St. Elizabeths in February of 1965, he has had no individual counseling sessions with a staff doctor on a regular basis, with the exception of the "unofficial" visits paid to him by Dr. Zegans after the latter was no longer on the hospital's staff (TR. 27-28, 150-66). In fact, Dr. Platkin's testimony at the hearing below candidly admitted the absence of regular staff visits to appellant, except for "occasional rounds by doctors". (Tr. 153-54).

17. Dr. Platkin, in testifying that he visited Mr. Solomon only twice from February of 1965 to the time of the hearing, openly confessed that "there is no specific treatment for Mr. Solomon" (Tr. 136-64). In weakly attempting to camouflage this situation by stating that there is treatment available to appellant is he so chooses, appellee ignores the fact that St. Elizabeths has failed to discharge its statutory duty to insure that Mr. Solomon does receive proper attention and care. He certainly feels this is not the case (Tr. 132). Further, it is especially important that appellant receive proper treatment, because a prison environment (John Howard Pavilion of St. Elizabeths is that hospital's maximum security ward) is a handicap to therapy of sociopaths. Noyes and Kolb, Modern Clinical Psychiatry,

op cit supra and at 554.[8]

18. In light of the above, appellant maintains that there are no facts in the record to support the trial court's finding (Tr. 233-34) that adequate treatment is being afforded to Mr. Solomon. The government has failed to sustain its burden of showing appellant is being adequately treated by the hospital. If he is not being treated, he must be released. Appellant's petition for writ of habeas corpus was thus improperly denied on this ground.

B. The record clearly demonstrates that Samuel Solomon, if released from the hospital, would be dangerous neither to himself nor to society.

19. Samuel Solomon is a gentle individual not disposed to commit any acts of violence.[9] He has been confined in St. Elizabeths Hospital's maximum security ward only by virtue of a charge of writing a bad check. Appellant has learned his lesson and has demonstrated that he can live outside of the hospital environment without engaging in any of the acts of false pretenses for which he was originally committed. In all respects, therefore,

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8/ In this same sense this Court recently held that chronic alcoholics must be treated for their disease and can not be arrested and held in jail under a charge of public intoxication. Easter v. District of Columbia No. 19365 (D.C.Cir. March 31, 1966).

9/ See testimony of Dr. Platkin (Tr. 168).

Mr. Solomon could not be considered a "danger" to himself or to society.

20. This Court has attempted to define the concept of "dangerous to society", but not without some difficulty. In Overholser v. Lynch, 109 U.S. App. D. C. 404, 288 F. 2d 388 (1961) en banc), and Overholser v. Russell, 108 U.S. App. D. C. 400, 283 F. 2d 196 (1960), persons confined in St. Elizabeths Hospital after being acquitted of charges of writing bad checks by reason of insanity petitioned the District Court for a writ of habeas corpus, seeking release from the hospital. In these cases this Court adopted the rather strict test that danger to the public need not be possible physical violence or a crime of violence, as long as petitioner is likely to commit any crime. A similar position was taken in the later case of Overholser v. O'Beirne, 112 U. S. App. D. C. 267, 302 F. 2d 852 (1961).

21. Appellee attempts to use this line of cases to support its argument that if released appellant would be dangerous to himself and others (Br. 15-16). Reliance upon these cases, however, is misplaced. At no place in the record do any of the doctors testify that it is likely Mr. Solomon would engage in renewed criminal activity involving false pretenses, nor do they state affirmatively and unequivocally that appellant would be a public danger. Appellee places par ticular reliance on the testimony of Dr. Zegans (Br. 15-16), but no where does he predict it probable

that appellant will resort to conduct resulting in criminal charges. He merely states that it is likely that appellant would make some purchases that he would be unable to pay for (Tr. 51), after previously saying it was possible Mr. Solomon would never again purchase things he didn't need (Tr. 50). Similarly, Dr. Platkin was unable to state that once released appellant would likely become involved in criminal activity involving passing bad checks (Tr. 156-57, 168-84). In fact, he testified that,"I have referred several times to Mr. Solomon as a public nuisance rather than being dangerous... and I still take that position" (Tr. 175). The testimony of Dr. Papish is similarly noncommital on the issue of danger (Tr. 198).

22. Appellant concedes that testimony was given at the hearing below saying that Mr. Solomon very likely would purchase some items on credit beyond his immediate ability to repay. It was for this reason that Dr. Platkin called appellant a "public nuisance" (Tr. 175-76). But the conduct predicted is not conduct involving commission of a crime. Furthermore, it is relevant to note the absence of any significant previous criminal charges brought against Mr. Solomon, by which we may be helped to predict his future conduct . This is to be contrasted with both the O'Beirne case, supra, and the case of Ragsdale v. Overholser, 108 U.S. App. D. C. 308, 281 F. 2d 943 (1960), in which a finding of probably "danger to society" was made in light of

petitioners' extensive past criminal records.

23. Appellant invites the attention of this Court to the various concurring and dissenting opinions of Chief Judge Bazelon and Circuit Judges Fahy and Edgerton in the Lynch, O'Beirne, Russell and Ragsdale cases, supra. There it is urged that Congress intended to define "dangerous to society" to mean conduct of a degree of seriousness at least as great as that for which the committed person was acquitted. Using this approach, one is unable to say that the mere possibility that Samuel Solomon will incur some civil debts is as serious as his original criminal charge of writing bad checks under false pretenses. Mr. Solomon is not likely to commit any crime if he is released. Even if he incurred some civil debts, this would hardly be as serious as the criminal charge of false pretenses for which he was acquitted and sent to St. Elizabeths. Thus, no matter what approach is adopted by this Court in defining the concept of "dangerous to society " appellant can not be considered a danger and is therefore eligible for release.

24. Looking at the evidence before the court below, and construing possible inconsistencies in a light most favorable to the government's position, all that can be said of this evidence is there is some likelihood that Samuel Solomon, if released, might make some unnecessary purchases that he could

not afford. This hardly is an unusual occurence or "public danger" in our hectic commercial world where overbuying on credit is almost commonplace.

25. Thus Mr. Solomon's appeal comes down to one basic question: Must Samuel Solomon be kept in a maximum security institution out of fear that if released he may charge some items on credit for which he has no funds? The answer must be "no". To resolve this question otherwise would be to turn St. Elizabeths Hospital into a protective ward for the benefit of foolish creditors. This certainly is not the function of our system of criminal justice. Mr. Solomon has no inclination to become involved again in conduct amounting to criminal false pretenses. It is not the function of the hospital to insulate society from potential possible debtors.

26. To decide otherwise would be to discriminate unfairly against Samuel Solomon, since every day countless individuals charge items that they can not afford. Are they required to spend time in the maximum security ward of a mental institution? Are they "dangerous to society" or to themselves? Certainly not, and in the very same sense Samuel Solomon, even if he made some unnecessary purchases on credit that he could not afford, could scarcely be considered a "danger to society".

27. Appellant can find no support in the record to justify the trial Court's finding that by obtaining credit beyond his ability to repay Mr. Solomon

would be dangerous to himself or others within the meaning of the statute (Tr. 23132). This finding can not properly be allowed to stand in light of the evidence presented before the Court. Appellant urgently requests that this Court reverse the erroneous finding of the Court below.

Respectfully submitted,

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June 25, 1966

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(Appointed by this Court)

Certificate of Service

I hereby certify that I have mailed, postage prepaid, this 25th day of June, 1966 copies of the foreging Reply Brief for Appellant to:

Theodore Weiseman, Esq.
Assistant United States Attorney
United States Courthouse
Washington, D. C.

Robert A. Marmet

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,685

SAMUEL L. SOLOMON, APPELLANT

v.

DALE C. CAMERON, Superintendent, St. Elizabeths Hospital, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
EARL J. SILBERT,
THEODORE WIESEMAN,
Assistant United States Attorneys.

H.C. No. 208-65

QUESTIONS PRESENTED

1. Whether the sufficiency of the evidence at a hearing on a motion to revoke appellant's conditional release from St. Elizabeths Hospital is open to attack in a habeas corpus proceeding?

2. Whether individual therapy, group therapy, and environmental therapy, which appellant is receiving at the hospital, constitute treatment?

3. Whether appellant's disposition to amass large bills for extravagant items, which he knows that he cannot pay, is a danger to himself or others?

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied on are marked with asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant is confined in St. Elizabeths Hospital under the mandatory commitment provisions of 24 D.C. Code § 301(d), having been found not guilty by reason of insanity on a misdemeanor charge of false pretenses (22 D.C. Code § 1301) in the Municipal Court on February 23, 1962. The information charged him with receiving $64.67 by presenting a false check. (U.S. 550-62).[1]

[1] "Tr." refers to the transcript of the habeas corpus hearing below and "H.C. 208-65" to the record file of the instant case. In

About one year later, March 14, 1963, an attorney filed a petition for a writ of habeas corpus on behalf of appellant alleging recovery from any abnormal mental condition. The hospital answered that appellant suffered a passive-aggressive personality disorder and would endanger himself and others if released. Under direction of the court, the Legal Psychiatric Service examined appellant and reported the presence of a mental disorder:

> Passive-Aggressive Personality, Passive-dependent type (Sexual Deviation—Homosexuality), and while he probably will not profit markedly from continued hospitalization, if he were released from the hospital in his present condition he most likely would constitute a danger to the community in the sense that he would eventually revert to the type of anti-social behavior which originally got him into trouble, *i.e.*, False Pretenses.

On May 29, 1963, the Honorable Luther W. Youngdahl, after a full hearing, ordered appellant released conditionally for a six-month trial period to work at an art gallery during the day and return to the hospital each night (H.C. 112-63).

The hospital asked the court to revoke the release on November 11, 1963, because appellant had accumulated $700 in unpaid bills and the art gallery had fired him (H.C. 112-63). In response, appellant filed a petition for a writ of habeas corpus (H.C. 532-63). Judge Youngdahl appointed counsel to represent appellant and consolidated appellant's petition and the hospital's motion for a single hearing. On January 20, 1964, Judge Youngdahl denied habeas corpus and revoked the conditional release, finding that appellant had charged $300 in bills "for

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addition, the court below had before it the records of three prior habeas corpus proceedings and the original record from the Court of General Sessions (Tr. 9-11). These records are referred to by their respective docket numbers: the three habeas corpus proceedings being "H.C. 112-63", "H.C. 532-63", and "H.C. 171-64", and the original General Sessions record being "U.S. 550-62."

divers of items for which he had no need[2] and for which he could not expect to pay with the wages and resources he possessed or expected to have; and that by his admission he has previous to his conditional release been convicted of False Pretenses three (3) times." (H.C. 112-63).

Three months later, April 30, 1964, another attorney filed another petition for a writ of habeas corpus. After an evidentiary hearing, the Honorable Leonard P. Walsh denied the petition on May 22, 1964 (H.C. 171-64).

Two months later, July 9, 1964, the hospital asked the Court of General Sessions to grant appellant a conditional release (1) to reside in Boston under the close supervision of his brother, (2) to undertake "intensive individual therapy" from a competent psychiatrist, and (3) to remain under the hospital's supervision until recovery from his mental illness "Sociopathic Personality Disturbance, Antisocial Reaction" (U.S. 550-62).[3] Dr. Mauris M. Platkin, the psychiatrist who recommended the second conditional release, testified at the hearing below that the recommendation was prompted by an interview with appellant's brother, who reasoned that the Boston environment, an area familiar to appellant and near to his family, might induce appellant to make the psychological adjustments necessary for recovery (Tr. 140-141). Dr. Platkin had reservations in recommending a second release—and "was perhaps guilding [sic] the lily a little bit in making the situation rosier than it was"—but appellant had shown no improvement after two years and

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[2] Appellant testified below that the bills were for clothes, books, records, men's colognes, and drugs (Tr. 100, 104). Two psychiatrists testified that the bills were sent to the art gallery, that appellant denied making the purchases, and that the items included "large numbers" of books and records, subscriptions to expensive magazines ("twenty dollars yearly"), "pharmaceuticals of an unnecessary nature", a face mask, an ascot, flowers, and a catering service (Tr. 53-54, 147). According to appellant, his salary was from $25 to $50 plus 10% commission weekly (Tr. 105-106).

[3] The hospital had changed appellant's official diagnosis from passive-aggressive personality to antisocial reaction (Tr. 177).

an abrupt change of environment might have a therapeutic effect (Tr. 140-141, 158-159). On July 14 the Honorable Austin L. Fickling ordered release subject to the conditions proposed by the hospital (U.S. 550-62).

Seven months passed, and in February 1965 the hospital wrote to the Court of General Sessions that appellant had violated the terms of his release by leaving Boston, discontinuing therapy, and incurring bills that he could not pay.[4] The court issued a bench warrant, which was executed at Washington National Airport on February 4. The government filed a written motion to revoke the release, reciting the same averments as the hospital's letter. The court set the hearing for February 11 and served appellant with a notice to show cause. Later, the hearing date was continued to February 17, and on that date, appellant appeared with counsel for a hearing of the motion. After hearing testimony, the Honorable Edward A. Beard revoked the conditional release, and the court papers bear the notation: "Preliminary hearing held conditional release revoked. Def. committed to St. Eliz Hosp." (U.S. 550-62; Tr. 16, 108).

Three months later, May 13, 1965, appellant filed the instant petition for a writ of habeas corpus. The Honorable Spottswood W. Robinson III appointed counsel, ordered the Legal Psychiatric Service to conduct an independent examination, and heard testimony and argument on three separate days.

Dr. Leonard S. Zegans, a staff psychiatrist at the hospital, appeared on behalf of appellant and testified that he held interviews with appellant about once a week between August 1963 and July 1964. After appellant's return in February 1965, Dr. Zegans continued in an unofficial, quasi-therapeutic capacity by attempting to see appellant

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[4] The hospital's letter alleged that the bills amounted to $10,000; however, testimony at the hearing below showed that this information was based on a letter received from appellant's brother, and there is no competent evidence in the record about the amount of bills charged in Boston (Tr. 148). As for the other matters, appellant's testimony at the hearing showed that he left Boston for Florida and discontinued therapy (Tr. 109-118).

each week to discuss his problems and to give him advice (Tr. 25-28, 32-35). He diagnosed a character neurosis, which manifests itself as follows:

> impulsevity [sic], difficulty in learing from previous experiences, narcistic qualities, certain infantile behavior, certain inability to withstand deprivations of certain types of gratifications (Tr. 36-37).
>
> * * * *
>
> [Appellant suffered] from the problem of inability to learn from his past experiences to deny the immediate gratification of his wishes and to delay this gratification and that he has difficulty in controlling certain behavior, particularly means of calling attention to himself when he is in public (Tr. 46).

Both Dr. Zegans' diagnosis and the official hospital diagnosis of antisocial reaction described the same behavior, the only difference being prospects for treatment (Tr. 36-37). Although still of unsound mind, appellant could return to society with sufficient treatment, but Dr. Zegans did not believe "at the present time that such treatment has been sufficient, that he has received it in enough length and duration" (Tr. 42-44, 46-47). If released, the "probabilities are extremely high" that appellant would buy items on credit that he neither needed nor could afford (Tr. 51). Appellant "would make a representation as with regard to his intent to pay which may be unrealistic and he may know that it is unrealistic at that time, . . . and that by opening up a charge account he would imply that he could pay for it when in fact he would know that he could not" (Tr. 51-52).

Appellant testified that his brother coerced him into leaving Boston and that his attempts to obtain therapy were frustrated (Tr. 109-117). He spent a few weeks in San Juan but was unable to find employment and left for West Palm Beach, Florida, where he first worked in a linen shop and later in a men's store (Tr. 117-118). He left the men's store in January after he did not receive the salary promised him and his employer falsely accused him

of stealing a sweater (Tr. 119-120). He left two unpaid bills in Florida—$163 for liquor at Christmas time and $150 for linens for his apartment (Tr. 121-122). In the past, he recognized, he "wasn't able to hold a job without having a personality conflict with whoever I was working with" (Tr. 119).[5] He had learned his lesson, and if released, he would not create debts (Tr. 124).

Dr. Mauris M. Platkin, chief of the service to which appellant was assigned, testified that appellant suffered an abnormal mental condition, antisocial reaction, and has shown no improvement of any significance (Tr. 143-145, 189). One symptom of the illness was that appellant was "extremely self-centered . . . and incapable of or unwilling to defer any kind of gratification" (Tr. 146). Another was that appellant had "an enormous lack of insight and appreciation of his difficulty" (Tr. 144). In appellant's eyes, "other people were just not helping him, were not doing the right thing, were being unfair to him, were distorting the situation, were misinterpreting the facts, were not giving him the help he needed" (Tr. 144). Running up extravagant bills that he is unable to pay is a manifestation of his mental disorder (Tr. 147). Dr. Zegans' diagnosis of character disorder was consistent with the official diagnosis of antisocial reaction (Tr. 145-146).

A few months before the hearing, Dr. Platkin remarked in appellant's presence that "custodial care" might be the best that the hospital could offer (Tr. 29, 149). By this remark, Dr. Platkin meant that the hospital had exhausted all possible avenues in trying to treat appellant, and now could only repeat the same procedures and hope that they bear fruits (Tr. 149). In addition to individual consultations with Dr. Zegans,[6] appellant had

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[5] The record documents appellant's employment difficulties. According to his statements, four employees failed to pay him salaries promised earlier; one of these employers was of questionable character; another engaged in fraudulent practices; and the men's store manager accused him of stealing (Tr. 96, 105-107, 119-120; and see appellant's petition in H.C. 532-63).

[6] At the hearing, Dr. Zegans indicated that he intended to resign from the hospital shortly (Tr. 27). Information in the hospital

available all the resources of the hospital: interviews with psychiatrists when necessary and on their rounds, group therapy, and various recreational and occupational therapy programs which give the patient a chance to express himself and gain respect for his accomplishments (Tr. 150-156). Above all, being in the hospital in itself therapy; for the hospital provides a secure and controlled environment sympathetic to appellant's psychiatric and physical needs. It is an environment free of the stresses that would aggravate appellant's mental disorder (Tr. 151-156). Appellant, himself, has been active in "numerous intramural activities," did art work at one time, and has been participating in group therapy (Tr. 152, 160, 166). Dr. Platkin was "extremely cynical" whether appellant would eventually make a satisfactory adjustment (Tr. 157). Appellant is "a very gentle individual", not disposed to violence, but if released, "a strong possibility" persists that he would continue to amass bills for extravagancies that he could not possibly pay (Tr. 157, 168, 172).

Dr. Platkin also remarked in appellant's presence words to the effect that he "had to twist things a little on the witness stand," but appellant misinterpreted the remark in thinking that it referred to the revocation hearing before Judge Beard: both Dr. Platkin and Dr. Zegans, who was present, agreed that the remark referred to Dr. Platkin's "guilding [sic] the lily a little bit in making the situation rosier than it was" in recommending a conditional release to offer appellant the opportunity to go to Boston with his brother (Tr. 40-41, 157-159; see p. 3, *supra*).

The remaining psychiatrist, Dr. Irwin J. Papish, who administered the independent metal examination for the Legal Psychiatric Service, testified that appellant was a "sociopathic personality, antisocial type" and agreed with

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records about the nature of treatment appellant has received since the hearing, which occurred in July 1965, is not in the record before the court.

Drs. Zegans and Platkin that appellant had no control over his impulses and would repeat the same acts if released (Tr. 196-198). Appellant reacted to stress and frustration by flying off on "shopping sprees," and would rationalize the expenses later as necessary. For instance, Dr. Papish testified, "He even raised some question about . . . two or three sets of china and how necessary this was" (Tr. 201).

STATUTE INVOLVED

Title 24, District of Columbia Code, Section 301, provides in pertinent part:

* * * *

> (d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.
>
> (e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection

of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: *Provided*, That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

* * * *

(g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

* * * *

SUMMARY OF ARGUMENT

Appellant's challenge to the validity of the hearing revoking his conditional release lacks merit, for there was no denial of due process and the sufficiency of the evidence cannot be questioned in a habeas corpus proceeding. Assuming *arguendo* that appellant can challenge medical treatment at the hospital, his treatment included private interviews with a staff psychiatrist, group therapy, and the therapy of the hospital environment, which fulfilled recognized psychiatric standards and was sufficient as a matter of law. If released from the hospital, appellant would use false pretenses to buy large volumes of extravagancies on credit, which would be a danger, not only to the community, but to appellant as well.

ARGUMENT

I. The revocation of appellant's conditional release cannot be attacked collaterally in the instant case.

(Tr. 16, 108)

There is no merit to appellant's contention that his confinement at the hospital is unlawful because "the evidance before Judge Beard was wholly inadequate to serve as a basis for revocation of his conditional release" on February 17, 1965 (App. Br. 8). Not every error can be raised in a habeas corpus proceeding because one of the most basic of all legal principles is "that the writ of *habeas corpus* will not be allowed to do service for an appeal."[7] To gain release on habeas corpus, a hospital patient must show either (1) that the hospital has lost its legal authority to confine him because he has regained his sanity, and the court order authorizing his detention provided that he shall be released on recovery of mental health;[8] or (2) that the court order committing him to

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[7] *Sunal* v. *Large*, 332 U.S. 174, 178 (1947).

[8] The writ of habeas corpus tests the lawfulness of a detention, and a detention lasting longer than the time period specified in the

the hospital was void because the court lacked jurisdiction, the order violated fundamental constitutional rights, or a manifest injustice occurred because exceptional circumstances prevented him from appealing a lesser error.[9] Here, appellant attacks the order committing him to the hospital, the order of February 17, 1965, in the Court of General Sessions revoking his conditional release. If revocation had occurred without any hearing or in violation of fundamental constitutional rights, he could challenge the revocation in the instant proceedings, but he cannot complain of mere procedural defects or obtain a rehearing on the sufficiency of the evidence. The record in this case shows that the revocation stands invulnerable to collateral attack; for Judge Beard conducted a hearing and heard testimony, appellant received ample notice, he was represented by counsel, and he had a full opportunity to be heard. (Counterstatement, *supra*, p. 4). Nothing in appellant's argument (App. Br. 8-10), or in the record, even remotely suggests a deprivation of due process of law.

II. Appellant is receiving treatment at the hospital.

(Tr. 25-28, 32-35, 150-156, 160, 166).

Assuming *arguendo* that the hospital cannot continue to confine appellant unless he is receiving treatment,[11] the

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court order loses legal authority. Thus a convicted criminal defendant can use habeas corpus to obtain release after his sentence expires, and similarly, a mental patient can use the writ to obtain release after recovery from mental illness.

[9] *E.g.*, *Hill* v. *United States*, 368 U.S. 424, 428 (1962); *Sunal* v. *Large*, *supra* note 7; *Escoe* v. *Zerbst*, 295 U.S. 490, 494 (1935); *United States* v. *Sobell*, 314 F.2d 314, 322-323 (2d Cir.), *cert. denied*, 374 U.S. 957 (1963). The *Hill* and *Sobell* cases discuss 28 U.S.C. § 2255 under which the scope of relief is identical with the writ of habeas corpus. *Hill* v. *United States*, supra at 427.

[11] The Court has said, on the one hand, that the nature of treatment is not open to judicial review because rehabilitative therapy is "clearly the province of the hospital alone . . .," *Hough* v. *United States*, 106 U.S. App. D.C. 192, 196, 271 F.2d 458, 462 (1959); and

district court's finding that appellant was receiving treatment was not clearly erroneous. At the time of the hearing, appellant was seeing Dr. Zegans privately, participating in group therapy, and living in a controlled therapeutic environment that in itself provided treatment (Counterstatement, *supra*, pp. 4-5, 6-7).[12] This Court has held that lesser treatment is sufficient.[13]

The hospital has diagnosed appellant as a sociopath—a mental disorder consisting of an inability to control antisocial impulses (Counterstatement, *supra*, p. 6). Sociopaths, "in spite of repeated humiliations and punishments, fail to learn to modify their behavior." [14] In other

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on the other hand, that constitutional objections might arise if mandatory commitment under 24 D.C. Code § 301(d) did not presuppose that "treatment will be accorded," *Darnell* v. *Cameron*, 121 U.S. App. D.C. 58, 61, 348 F.2d 64, 67 (1965). To be sure, the conduct of public officials must conform to the requirements of the due-process clause, and the hospital cannot arbitrarily and capriciously withhold treatment or erect an invidious discrimination by unreasonably denying to appellant treatment available to others, *cf. Baxstrom* v. *Herold*, 383 U.S. 107 (1966); but we have reservations whether the constitution requires any particular form of treatment, such as individual therapy, and we do not understand *Hough* and *Darnell* to suggest any such requirement. At most, those cases indicate that a patient can seek relief if the hospital unreasonably refuses to treat him—which was the uncontroverted testimony of the patient in *Darnell*—but that otherwise, the court cannot review the forms of treatment chosen by the hospital. Since appellant is receiving treatment, such issues are not involved in the present case. Two cases are now pending decision before the Court that present treatment considerations analogous to the present case: *Millard* v. *Cameron* (No. 19,584) and *Rouse* v. *Cameron* (No. 19,863).

[12] See note 6, *supra*.

[13] In *Foller* v. *Overholser*, 110 U.S. App. D.C. 239, 292 F.2d 732 (1961), this Court held the evidence was sufficient to show that the patient was receiving treatment. The opinion did not review the evidence, but the record before the Court showed that the treatment consisted of environmental therapy, occupational therapy, and discussion of administrative problems with staff psychiatrists (See Brief for Appellee, No. 16,130, pp. 2-3, 12-13). In the instant case, appellant has received all that, as well as group and individual therapy.

[14] Noyes & Kolb, *Modern Clinical Psychiatry*, 460 (6th ed. 1963).

words, the essence of the disease is antisocial behavior and a principal manifestation is criminal recidivism. What to do with the sociopath has posed a perplexing problem for both law and psychiatry. Treatment is difficult; some think impossible.[15] Some authorities have carved out a special exception for sociopaths and have refused to allow them to use the insanity defense,[16] but this Court has chosen a different alternative by recognizing the defense and providing an opportunity for hospital treatment to break the vicious cycle of repeated criminality.[17] Hospital treatment is not futile, according to Drs. Noyes and Kolb, who discuss treatment as follows: [18]

> Essential to any effective therapy is the placing of the individual in an accepting and warm human environment where he may find it possible to develop a therapeutic relationship with some member of the treatment group whom he perceives as having his interests at heart and to whom he can give some trust.
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>
> With the older psychopaths, this initial step becomes increasingly difficult and often is impossible due to the inherent ego defect of basic distrust. Psychiatrists and others treating such patients must be highly motivated and endowed with a mature patience to effect the development of the therapeutic relationship.
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> When the treatment relationship is established, either through individual or group identification,

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[15] See *e.g.*, concurring opinion of Judge Burger in *Blocker* v. *United States*, 110 U.S. App. D.C. 41, 48-49, 288 F.2d 853, 860-861 (1961) (*en banc*); and "Excerpts from Correspondence between Mr. Manfred Guttmacher and Herbert Wechsler," in *Model Penal Code*, § 4.01, comment, 182-192 (Tent. Draft No. 4, 1955).

[16] *Model Penal Code op. cit. supra* note 15, § 4.01(2) and comment.

[17] *Blocker* v. *United States*, 107 U.S. App. D.C. 63, 274 F.2d 572 (1959) (*en banc*).

[18] Noyes & Kolb, *supra* note 14, at 464-465.

pressure through personal and verbal behavior must be initiated toward certain goals and standards of social relationship. *Usually such efforts must be made continuously and slowly*, and infractions should be treated by withdrawal of privileges and their reinstitution on improved behavior. The treatment relationship, whether established through the medium of a single psychiatrist or a group, makes clear certain standards of behavior, and their abuse is managed by frustrating loss of satisfaction in other areas. A sense of authority is consistently and firmly maintained. *This treatment regimen can be attained infrequently without some type of institutional care.* It clearly differs from the continually permissive attitude necessary for the treatment of the neurotic child or adult. If the latter is adopted throughout, no focus will be established for superego growth, and, if anything, the permissiveness may aggravate the antisocial behavior.

* * * *

A prison environment is a handicap to therapy. If the sociopsychopath's behavior brings him before court, the judge may be aware that ideally the treatment of the prisoner's behavior is by psychotherapy, through which its psychogenesis may be traced and its pathology cured. Like the psychiatrist, he may realize that punishment without recognition of the prisoner's emotional problems may intensify his social maladjustment. On the other hand, a person cannot be sentenced to therapy. (Emphasis supplied.)

Thus institutional care and its environmental therapy are essential prerequisites for recovery, and the hospital's treatment program follows accepted standards. When the sociopaths turns to criminal behavior—and appellant has three convictions for false pretenses (p. 3 *supra*)—the community has but two choices: deny him the defense of insanity and send him to prison, or recognize the defense and commit him to a hospital for treatment. Appellant is in a hospital receiving treatment.

III. Appellant would be dangerous to himself and others if released from the hospital.

(Tr. 48-55, 96-124, 147-48, 156-57, 167-72, 196-98, 201).

In order to obtain release, appellant must sustain his burden of showing that the hospital has arbitrarily and capriciously [19] refused to reognize that he is free "from such abnormal mental condition as would make [him] dangerous to himself or the community in the reasonably foreseeable future." [20] The district court's finding that appellant would be dangerous to himself and others if released was not clearly erroneous. Appellant's behavior when twice released conditionally in the recent past and the unanimous testimony of the psychiatrists leaves no doubt that, if released at this time, appellant would incur large bills for many extravagances, which he would know that he could not pay. Moreover, the record is clear that appellant's impulsive buying in bulk of books, records, linens, liquors, sets of china, and so forth, is a product of his illness (Counterstatement, *supra*, pp. 3, 6-8). To be sure, appellant is not violent and there is no indication that he would engage in the variety of criminal false pretenses for which he stands convicted, writing false checks.[21] But if released, appellant would engage in a different variety of false pretenses. Dr. Zegan's testimony was explicit that appellant would consciously use false representations to finance his purchases (Tr. 51-52):

> I would say he would make a representation as with regard to his intent to pay which may be un-

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[19] *Overholser* v. *Russell*, 108 U.S. App. D.C. 400, 402, 283 F.2d 195, 197 (1960); *Ragsdale* v. *Overholser*, 108 U.S. App. D.C. 308, 311-312, 281 F.2d 943, 946-947 (1960).

[20] *Overholser* v. *Leach*, 103 U.S. App. D.C. 289, 292, 257 F.2d 667, 670 (1958), *cert. denied*, 359 U.S. 1013 (1959).

[21] Danger to the community includes fraud as well as violence. *Overholser* v. *Russell*, *supra* note 19, at 403, 198.

> realistic and he may know that it is unrealistic at that time, that he may have the desire to purchase something which is beyond his pecuniary means which he knows is beyond his pecuniary means; and that by opening up a charge account he would imply that he could pay for it when in fact he would know that he could not.

Appellant's conduct would be a danger both to himself and others. Certainly, everyone who would extend him credit—and if appellant's past behavior is a reliable indicator, there would be many—would lose money. As for appellant, such behavior can only end in harassment, civil judgments, and criminal convictions. Now that appellant's brother has withdrawn his support, no one is available to pay appellant's debts, and he has been unable to maintain employment. In view of his past criminal record, future convictions—if the sanity defense is unavailable—will almost certainly result in imprisonment, which, according to Drs. Noyes and Kolb "will only intensify his social maladjustment" (p. 14, *supra*), and make his predicament even worse. Further treatment is necessary.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the district court should be affirmed.

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